IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1377 of 1992

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KANTILAL GOPJIBHAI PATEL

Versus

ENTERTAINMENT TAX COMMISSIONER

Appearance:

1. Special Civil Application No. 1377 of 1992
MR HARIN P RAVAL for Petitioner No. 1
MR SIRAJ GORI, AGP. for Respondent Nos. 1-2

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 24/06/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

What is challenged in this petition under Article 226 of the Constitution is the order dated 6/1/1992 passed by the Entertainment Tax Commissioner, Gujarat State arising from the order dated 19/7/1991 of the Collector, Mehsana under the provisions of The Gujarat Entertainments Tax Act,1977.

2 The petitioner was granted licence for Video cinema on 10/5/1990. The sitting capacity of the Video theatre was 125 as mentioned in the licence. On that basis the petitioner was paying amount of Rs.4,000/- as consolidated entertainment tax. It appears that on 12/8/1990 there was surprise checking and the officer found 33 spectators over and above 125 spectators which was maximum sitting capacity. On that basis show cause notice was issued calling upon the petitioner to show cause why the petitioner should not be required to pay entertainment tax which had escaped assessment for the entire period from the date of licence. The tax proposed to be assessed was Rs.18,273/- and penalty proposed to be levied was 150% of the said amount. After considering reply filed by the petitioner and after giving opportunity to the petitioner of personal hearing the Entertainment Tax Collector, Mehsana confirmed the show cause notice and assessed the tax and imposed penalty as proposed in the show cause notice. Against the said order dated 19/7/1992 (Annexure-D), the petitioner went in revision before the Entertainment Tax Commissioner. While admitting the Revision Application and granting conditional interim stay, the Entertainment Tax Commissioner required the petitioner to deposit an amount equal to 20% of amount of tax and penalty as levied by the Collector's order. (The petitioner has already deposited Rs.8,375/- in compliance of the said interim order.In support of the said statement the petitioner has relied on challan receipt [Annexure-F to the petition]). After hearing the petitioner, the Commissioner confirmed the finding about excess number of spectators found at the time of inspection/surprise checking but accepted the petitioner's contention that before the date of checking under consideration on six previous occasions there was checking and no irregularity was found; the number of spectators present was less than the sitting capacity as mentioned in the licence. In that view of the matter the Commissioner did not confirm the assessment of six weeks i.e. 42 days and levied tax for the remaining 52 days on the basis that 33 spectators in excess of the maximum sitting capacity were permitted to enter the video center

in all four shows for 52 days and on that basis the tax was assessed at Rs.9,266.40 ps. and penalty of Rs.13,899.60 ps. @ 150% of the amount of tax came to be levied by the impugned order.

3 When this petition was admitted this Court granted interim relief against implementation of the aforesaid order subject to the condition that the petitioner paid Rs.5,000/- to respondent No.2 Entertainment Tax Collector, Mehsana. According to the petitioner the said condition was complied with at the relevant time and thus the petitioner claims to have deposited in all Rs.13,375/-.

4 At the time of hearing of this petition Mr.Raval, learned Counsel for the petitioner sought to urge various contentions to dislodge the finding given by the Collector and confirmed by the Commissioner. However, in this petition under Article 226 of the Constitution this Court would be loath to interfere with the concurrent findings of fact given by the authorities under the Entertainment Tax Act, in so far as the authority found that on the date of checking 33 spectators were found in excess of the maximum capacity of 133 spectators.

There is, however, some substance in the submission of Mr.Raval that even on 52 days for which the Entertainment Tax Commissioner has given best judgment assessment, it would not be that in each of the four shows every time there would be 33 spectators in excess of the maximum sitting capacity. Looking to the fact that as many as on six occasions prior to 12/8/1990 the Inspecting Officer had found number of spectators less than maximum capacity the number of spectators in excess of the sitting capacity cannot be assessed as 33 for all four shows on all 52 days under consideration.

This infirmity would have required this Court to remand the matter to the Entertainment Tax Commissioner for hearing the Revision Application and decide the same afresh in accordance with law. However, considering the fact that the illegality in question took place in the year 1990 and this petition has been pending for the last 12 years, after hearing Mr.Raval for the petitioner and Mr.Gori for the respondents we are of the view that interests of justice would be served if the assessment made by the Entertainment Tax Commissioner is modified to the effect that only 75% of the assessment made by the Entertainment Tax Commissioner is upheld. The consequence of this finding would be that entertainment tax for 52 days in question would be Rs.6,942/- (rounded

off to Rs.6,950/-) instead of Rs.9,266/-.

5 In the peculiar facts and circumstances of the case and considering the fact that the assessment made by the Entertainment Tax Commissioner is substantially upheld for the 52 days even though the number of spectators found to be present on the six previous occasions was less than the maximum sitting capacity, we are of the view that the penalty imposed at the rate of 150% of the tax assessed, was excessive and disproportionate to the illegality found. We are of the view that here also instead of remanding the matter, interests of justice would be served if the amount of penalty is imposed equal to the tax assessed as per this order.

6 In view of the above discussion, the petition is partly allowed. The order of the Entertainment Tax Commissioner dated 6/1/1992 (Annexure-H) is modified to the effect that the petitioner shall pay the entertainment tax of Rs.6,950/- and penalty of equal amount i.e. Rs.6950/- aggregating to Rs.13,900/-. Against the said liability the amount already paid/deposited by the petitioner i.e.Rs.8,375/- + Rs.5,000/- aggregating to Rs.13,375/- shall be adjusted. The balance amount of Rs.525/- shall be paid to respondent No.2 within one month from today.

Rule is made absolute to the aforesaid extent with no order as to costs.

(M.S.Shah, J)

(D.A.Mehta, J)

m.m.bhatt